No. SC86768

IN THE SUPREME COURT OF MISSOURI

REPRODUCTIVE HEALTH SERVICES OF PLANNED PARENTHOOD OF THE ST. LOUIS REGION, INC. et al., Appellants,

v.

JEREMIAH W. NIXON, Attorney General of Missouri, in his official capacity, et al., Respondents.

On Appeal from the Circuit Court of Boone County, Missouri

APPELLANTS' REPLY BRIEF

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Appellants respectfully submit this reply to Respondent Nixon's and Respondent Joyce's Briefs. Section 188.039 of the Missouri Revised States ("Act") is impermissibly vague because it imposes boundless obligations on physicians. Consequently, physicians will have to guess as to how far they must go to comply with the Act and will never know for certain whether they have satisfied it. The Act also violates the heightened liberty and privacy rights, including the right to choose, guaranteed by the Missouri Constitution. Respondents fail to refute either of these claims, and, therefore, this Court should reverse the decision of the court below.

I. THE ACT IS IMPERMISSIBLY VAGUE

A. Appellants Can Meet The Burden Of Proving The Act Is Vague.

Respondents assert the general rule that Appellants carry a heavy burden to show the Act is impermissibly vague because statutes are presumed constitutional. (Resp't Joyce's Br. at 10; Resp't Nixon's Br. at 14.) That rule is more nuanced here, and Appellants can meet that burden in this case. Any vagueness in the Act must be viewed with heightened scrutiny by this Court because the Act both threatens a woman's constitutional right to choose an abortion and threatens those who violate it with criminal penalties. This Court has recognized that, in these two circumstances, courts must carefully scrutinize laws when analyzing a constitutional challenge on vagueness grounds. That is, legislative enactments are entitled to less deference where (1) the law threatens to inhibit the exercise of constitutionally protected rights, *State ex rel. Nixon v. Telco Directory Publ'g*, 863

S.W.2d 596, 600 (Mo. 1993) (en banc); or (2) the possibility of criminal sanctions exist, *State v. Shaw*, 847 S.W.2d 768, 774 (Mo. 1993) (en banc). (*See also* Appellants' Br. at 14-15.) The United States Supreme Court has held likewise. *See Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 489 (1982) (cited in Respondent Joyce's Br. at 10-13). Respondents have put forward no cases defeating this bedrock principle.

In a facial challenge, as here, the United States Supreme Court has made clear that a statute will be struck as impermissibly vague for failure to meet this heightened standard "even when it could conceivably have had some valid application." *Kolender v. Lawson*, 461 U.S. 352, 358 n.8 (1983) (citing *Colautti v. Franklin*, 439 U.S. 379, 394-401 (1979) (invalidating abortion statute on its face on vagueness grounds)).[1] Thus, contrary to Respondent Joyce's assertion,

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[1] A number of courts, applying the standard articulated in *Kolender*, 461 U.S. at 358 n.8, have upheld facial challenges to abortion statutes on vagueness grounds. *See, e.g., Planned Parenthood of Greater Iowa, Inc. v. Miller*, 30 F. Supp. 2d 1157, 1164-65 (S.D. Iowa 1998), *aff'd*, 195 F.3d 386 (8th Cir. 1999); *Planned Parenthood of Cent. N.J. v. Verniero*, 41 F. Supp. 2d 478, 490 (D.N.J. 1998), *aff'd*, 220 F.3d 127 (3d Cir. 2000); *Causeway Med. Suite v. Foster*, 43 F. Supp. 2d 604, 616 (E.D. La. 1999), *aff'd*, 221 F.3d 811 (5th Cir. 2000).

Appellants need not show that the Act is "impermissibly vague in all of its applications." (Resp't Joyce's Br. at 13.)[2]

B. The Act Is Boundless.

i. Understanding The Definition Of The Act's Terms Does Not Cure The Act's Vagueness.

Respondents' argument that the Act is not vague because its terms are (1) capable of dictionary definition; (2) have been used in court decisions; and/or (3) understood by medical professionals, including Appellants' experts (Resp't

[2] Respondent Nixon confuses the issue when he asserts that "[b]ecause this case is a facial challenge . . . this Court does not determine if there is some imagined situation in which the language used could be vague or confusing," and "[i]f a statute can be applied constitutionally, the appellant will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional." (Resp't Nixon's Br. at 14-15 (quotation marks and citations omitted).) A facial challenge, by definition, involves a claim that a statute is unconstitutional on its face and not, as Respondent Nixon's assertions suggest, as applied to a particular set of facts. As noted above, courts have routinely upheld such challenges to abortion statutes. *See supra* text at 7-8 and note 1.

Nixon's Br. at 15-17; *see also* Resp't Joyce's Br. at 17) wholly misses the point.[3] Appellants are not disputing the definitions of the Act's words. Instead, the vagueness problem here is whether physicians can be required to confer, evaluate, and discuss with each patient the vast universe of matters that obviously fall within the dictionary definition of the Act's terms—no matter how remote or irrelevant a particular matter may be for a particular patient—and subjected to

[3] Indeed, if either the fact that terms have dictionary definitions or have been used in court decisions were the test for vagueness, there would never be grounds for any vagueness challenge. But those criteria are not determinative of whether a statute is unconstitutionally vague, as the United States Supreme Court made clear when it struck down as vague a statute that subjected anyone who "treats contemptuously" the American flag to criminal liability, *see Smith v. Goguen*, 415 U.S. 566 (1974), even though the verb "to treat" and the adverb "contemptuously" are capable of dictionary definition and have been used in court decisions.

Moreover, contrary to Respondents' claim that the Act's terms are understood by medical professionals, Dr. Camel testified that he had never heard the term "situational factors" (LF at 103), and, while Dr. Stubblefield said he understood the dictionary definition of the word "indicator" (as read to him by Respondent Nixon's counsel), he did not state that he understood the meaning of that word in the context of the Act (*see id.* at 124).

criminal penalties for failing to do so. In a word, the Act's requirements are boundless.[4]

Simply knowing the definition or range of meaning of a particular term does not render the Act constitutionally clear. For example, "situational factors" could conceivably encompass every facet of life. Appellants' expert testified that "access to a telephone and emergency care, child care arrangements and absence from work, support from significant others and language barriers . . . employment, school, household or child care responsibilities" could all be situational factors. (LF at 126-28.) Respondent Nixon pointed to this testimony as evidence that the Act is not vague (Resp't Nixon's Br. at 16); to the contrary, the fact that so many and such a wide range of matters could fall within the meaning of one of the Act's terms makes clear that the Act is boundless and that physicians will never know for certain whether they have discussed with their patients everything required by the Act.

ii. The Act Places No Boundaries On Its Requirements For Physicians.

Respondent Nixon's response is simply that the "statute is not boundless" because it "meets [the] needs of patients," citing *City of Akron v. Akron Ctr. for*

[4] The Act's vagueness is compounded by the fact that it uses not one, but several boundless terms, including, for example, "indicators," "contraindicators," "risk factors," and "situational factors."

Repro. Health, Inc., 462 U.S. 416 (1983), *overruled on other grounds by Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992), and *Doe v. Bolton*, 410 U.S. 179, 192 (1973). (Resp't Nixon's Br. at 17-18; *see also* Resp't Joyce's Br. at 17 (stating that the Act only requires a physician to discuss with his or her patient "factors particular to that woman").)[5] While a state may seek to ensure that the abortion decision is made in light of "all attendant circumstances . . . that might be relevant to the well-being of the patient," *Akron*, 462 U.S. at 443 (citing *Colautti*, 439 U.S. at 394), if it seeks to do so it must provide guidance—or allow physicians' discretion—to cabin these "attendant circumstances" more tightly than the limitless approach the state took here. In fact, immediately after the statement quoted by Respondent Nixon, the Court went on to note that the physician must retain broad discretion to decide what information to convey to the patient: "It remains primarily the responsibility of the physician to ensure that appropriate information is conveyed to his patient, depending on her particular circumstances." *Id.* In contrast, the Act lacks any provision for physician

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[5] Thus, both Respondents implicitly acknowledge that an informed consent statute must allow a physician to tailor his or her evaluation and discussion to the particular patient. At best, however, it is unclear whether the Act's requirements permit such tailoring, and physicians cannot—and should not—be required to risk their freedom, medical licenses, and patients' constitutional rights on the basis of such ambiguous requirements.

discretion—indeed, the legislature purposely deleted language in the prior "informed consent" law that permitted a physician to act "in the exercise of his best medical judgment." (Appellants' Br. at 16-18.) And, while the prior statute stated that the physician "may" disclose certain information, Mo. Rev. Stat. § 188.039.3 (repealed 2003), the Act uses the term "shall," Mo. Rev. Stat. §§ 188.039.2 and 188.039.3. "A State [does not] ha[ve] unreviewable authority to decide what information a woman must be given before she chooses to have an abortion." *Akron*, 462 U.S. at 443.

Moreover, unlike the language in *Akron*, nowhere does the Act speak of "attendant" circumstances, factors "relevant to the well-being of the patient," or suggest that the Act's requirements "depend[] on [the patient's] particular circumstances." *Id.* Instead, the Act requires physicians to confer, evaluate, and discuss with the patient all indicators, contraindicators, and risk factors, no matter how remote or irrelevant they may be to that patient.[6]

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[6] Respondent Nixon's reliance on *Doe*, 410 U.S. at 192, is similarly misplaced. That case did not involve an informed consent provision. There, the challenged law made it a crime for a physician to perform an abortion except when it is "based upon his best clinical judgment that an abortion is necessary." *Id.* at 191. The Court held that "the medical judgment may be exercised in the light of all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient . . . . This allows the attending physician

Respondents claim, however, that the phrases "in light of her medical history and medical condition" and "as compared with women who do no possess such risk factors" used in the Act impose "boundaries." (Resp't Nixon's Br. at 18; *see also* Resp't Joyce's Br. at 17.) Respondents are wrong. The Act's requirement that the physician discuss all the factors with the patient "in light of her medical history and medical condition," Mo. Rev. Stat. § 188.039.2, does not diminish the boundless list of matters to be discussed**,** but simply adds yet another requirement—going through the list and for each matter explaining whether it is of any relevance to the patient in light of her medical history and condition. The phrase also raises more questions as to what the Act requires. Section 2 requires physicians to discuss with the patient "risk factors" for the abortion, including any "situational factors." How does a physician discuss with the patient "situational factors . . . in light of her medical history and medical condition" when "situational factors" include, by Respondent Nixon's expert's own definition (*see*

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the room he needs to make his best medical judgment." *Id.* at 192. Thus, the Court sought to ensure that physicians could take into account a broad range of factors in concluding that an abortion is "necessary." The Act, on the other hand, seeks to narrow the circumstances in which abortions can be performed by imposing on physicians limitless matters that must be discussed with the patient prior to the procedure.

Appellants' Br. at 19 (describing situational factors as "all environmental sort of factors")), non-medical matters?[7]

The phrase "as compared to women who do not possess such risk factors" in section 3 of the Act also does not ameliorate the Act's boundlessness. The phrase does not in any way confine physicians' evaluations only to certain risk factors or inform physicians of how they are to determine which of the potentially endless number of risk factors must be part of the evaluation. As Dr. Camel testified, "[e]valuating a patient does not involve comparing her with another individual. You evaluate that patient for what she has . . . . And you don't start comparing her with all kinds of other people. The two things are totally different." (LF at 104-05.) In addition, the phrase only relates to "risk factors" and does not even mention, let alone limit, the "indicators" and "contraindicators" for which the patient must be evaluated.[8]

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[7] Even if the phrase "in light of her medical history and medical condition" allows physicians to discuss only factors "particular" to the woman (Resp't Joyce's Br. at 17; *see also* Resp't Nixon's Br. at 18-20), it is still unclear what physicians must do to avoid criminal liability. For example, is a physician required to disclose all matters—however remote or non-material—that could be a risk factor for a particular patient?

[8] Respondent Nixon also relies on Dr. Ferris' testimony for the proposition that the Act's requirements are limited to the patient's "unique" situation. (Resp't

Appellants agree that—as with any medical procedure—physicians should inform their patients of the abortion procedure's attendant risks and consequences, as well as alternatives, and provide the "best" information available. Appellants also agree that a physician should tailor his or her evaluation to each individual patient's situation. (Resp't Nixon's Br. at 19-20.) Indeed, this is what Appellants' physicians were doing (under the prior statute) and are still doing. However, these are not the Act's requirements as expressed by its terms, and they certainly are not what Appellants' experts understood the Act's requirements to be. Instead, the Act subjects physicians to criminal prosecution for failing to confer, evaluate, and discuss with their patients, all possible "indicators and contraindicators, and risk factors, including any physical, psychological, or situational factors," prior to an abortion—a far cry from the "freedom to ask questions" or "guidelines" Respondent Nixon claims the Act provides. (*Id.* at 19-20.)[9]

Nixon's Br. at 19.) Again, nowhere does the Act refer to factors related to the patient's particular circumstances, and, as explained above, the Act's so-called "boundaries" do not in any way clarify the scope of physicians' obligations.

[9] Respondents assert that physicians could escape liability merely by having the patient complete a standard form supposedly to be promulgated by the Department of Health and Senior Services. (Resp't Nixon's Br. at 20; Resp't Joyce's Br. at 19). Such a form, however, has not been promulgated, and, as Respondent Nixon makes clear, the Act's requirements and criminal penalties are

iii. The Statute Does Not Have A Legitimate Purpose.

Respondent Nixon's assertion that the Act has a "legitimate purpose" (*Id.* at 20-22) is also wrong.[10] The "language of the provision" itself—which

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in force even if the agency never issues a form. (Resp't Nixon's Br. at 20.) Moreover, Respondents' argument is circular: if physicians do not understand the Act's requirements, it is unclear how they can, in good faith, cause their patients to sign a form indicating that the physician has met the Act's requirements.

[10] Even if the Act has a legitimate purpose, it is nonetheless, for the reasons described above and in Appellants' opening brief, impermissibly vague. Indeed, Appellants did not, as Respondent Nixon asserts, "conclude[]" in their opening brief that "the General Assembly must have had an illegitimate purpose in enacting the new law because the legislature is presumed not to have done a meaningless act." (Resp't Nixon's Br. at 20-21.) Instead, citing well-established canons of statutory construction, Appellants stated that, because the prior statute more clearly defined the scope of the physicians' obligations, the legislature must have intended to effect some change in that law when it passed the Act. (*See* Appellants' Br. at 17-18.) *Gartenbach v. Bd. of Educ.*, 204 S.W.2d 273 (Mo. 1947), cited by Respondent Nixon (Resp't Nixon's Br. at 22), does not alter this result; indeed, in that case, the court held that a statute "as a legislative interpretation of the law as it previously existed" is "persuasive" on the courts. *Gartenbach*, 204 S.W.2d at 276.

Respondents Nixon urges this court to consider to determine the intent of the legislature (*id*. at 21)—imposes boundless, and, therefore, impermissibly vague, obligations on physicians. To the extent there is any ambiguity that this is what the legislature intended, one need only look at the predecessor "informed consent" provisions of the Missouri Revised Statutes, which imposed more clearly defined boundaries and allowed physicians to exercise their professional judgment.[11]

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[11] Respondent Nixon asserts that

> It is puzzling that Planned Parenthood would even suggest that Missouri's legislature had an improper purpose in enacting a new informed consent statute to replace the prior statute when Planned Parenthood and its lead counsel in this case argued nearly two decades ago that the prior statute was unconstitutional and successfully sought a permanent injunction against its enforcement in *Reproductive Health Services. v. Webster*, 662 F. Supp. 407 (W.D. Mo. 1987), *aff'd in part*, *rev'd in part*, 851 F.2d 1071 (8th Cir. 1988), *rev'd*, 492 U.S. 490 (1989).

(Resp't Nixon's Br. at 21.) In *Webster*, neither Planned Parenthood nor its lead counsel in this case challenged the "informed consent" provision in the prior statute on vagueness grounds, or otherwise asserted that the provision was boundless. 662 F. Supp. at 413-416. Moreover, that the prior statute was also flawed in certain respects does not make this one constitutionally acceptable.

As support of the legislature's supposed "legitimate" intentions, Respondent Nixon cites the opening provision of Chapter 188, "Intent of general assembly," enacted in 1974. (Resp't Nixon's Br. at 21.) While the legislature—more than three decades before the Act was passed—may have expressed a general intention "to regulate abortion to the full extent permitted by the Constitution of the United States, decisions of the United States Supreme Court, and federal statutes," Mo. Rev. Stat. § 188.010, that intention is certainly not borne out by the Act or circumstances surrounding its enactment. Respondents cite no decision of the United States Supreme Court—or any other federal or state court in the United States—upholding an "informed consent" statute with language as vague and broad as the language in the Act, and, indeed, Appellants are not aware of any.

Further, as explained in Appellants' opening brief, some of the most troubling language in the Act is taken from so-called "model" legislation promoted by an organization, the Elliott Institute, whose self-described mission is to "end abortion." (Appellants' Br. at 18 n.4.) The organization describes the model legislation as a way to "make it easier for women to hold abortionists liable for failing to screen for the many risk factors associated with post-abortion problems and for the injuries caused by abortion." (*Id.*; LF at 254.) Respondent Nixon does not deny that the "model" legislation formed the basis of the Act, but rather claims that the documents are "inadmissible hearsay." (Resp't Nixon's Br. at 22.) Extrinsic evidence is often used, however, to interpret legislative intent

where the meaning of the statute is ambiguous. *See Kieffer v. Kieffer*, 590 S.W.2d 915, 918 (Mo. 1979) (en banc) ("Where an ambiguity exists, in fact or by construction, it is proper to consider the history of the legislation, the surrounding circumstances and the ends sought to be accomplished."); *Commerce Bank v. Mo. Div. of Finance*, 762 S.W.2d 431, 435 (Mo. Ct. App. 1988) (court may look to extrinsic aids in interpreting statute if there is ambiguity in the statute).

Moreover, the documents are not hearsay because they are not offered to prove the truth of the matter asserted—*i.e.*, that the Elliott Institute actually strives to "end abortion" or that the model legislation actually "make[s] it easier for women to hold abortionists liable." Rather, the documents are offered to demonstrate that the legislature based the Act on "model" legislation that it believed—correctly or not—would interfere with a woman's constitutional right to choose. Thus, contrary to Respondent Nixon's assertion (Resp't Nixon's Br. at 22), there is both admissible and compelling evidence in the record to overcome any presumption that the Act was passed for legitimate reasons.[12]

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[12] Respondent Nixon should not be heard to argue that the documents are "pure conjecture." (Resp't Nixon's Br. at 22.) Respondent Nixon's own expert witness, Dr. Ferris, admitted at his deposition that, in doing research for his expert declaration, he relied on the Elliot Institute's website and copied much of his expert declaration from an article posted on that website without attribution. (*See* LF at 187-89; *see also* Appellants' Br. at 18 n.4.)

C. The Scienter Provisions Do Not Cure The Act's Vagueness.

The scienter provisions do not eliminate the problems caused by the Act's vagueness. Physicians simply do not know how far they must go to comply with the Act or to what extent they can, if at all, exercise their medical judgment under the Act. For example, would section 188.075's "knowing" requirement save a well-meaning physician who missed one or two of the scores of matters encompassed by the term "risk factors?" Or one who failed to disclose a particular risk factor because his or her good-faith medical judgment was that the factor is irrelevant or remote?

The cases relied on by Respondents do not resolve these questions. In *Fargo Women's Health Org v. Schafer*, 18 F.3d 526 (8th Cir. 1994), the abortion statute expressly allowed the physician to rely on his or her "best clinical judgment" in determining whether a medical emergency exists. *Id.* at 534 ("it is the exercise of clinical judgment that saves the statute from vagueness"). Thus, in that case, so long as the physician determined in his or her good faith medical judgment that a medical emergency existed, even if the physician knowingly performed an abortion without obtaining informed consent, he or she would not be prosecuted. In contrast, here, if physicians determine in their good faith medical judgment that a "risk factor" is irrelevant or remote for a particular patient, and on that basis knowingly fail to confer, evaluate, or discuss that factor with the patient, at best, it is unclear whether physicians are guilty of violating the Act.

Moreover, in *Fargo* and the state cases on which Respondents rely (*see* Resp't Nixon's Br. at 23-24; Resp't Joyce's Br. at 18), the vagueness challenges focused on the meaning of certain terms in the statute. *See, e.g.*, *Fargo*, 18 F.3d at 534 (plaintiff asserted that statute was impermissibly vague because its terms, "major bodily function," "immediate," and "grave," are ambiguous); *State v. Lee Mech. Contractors, Inc.*, 938 S.W.2d 269, 272 (Mo. 1997) (holding that scienter requirement "adequately cures any uncertainty as to the meaning of the terms 'prevailing hourly rate of wages' and 'work of a similar character'"). As explained above and in Appellants' opening brief, the "uncertainty" here does not revolve around the "meaning" (or definition) of particular terms, but rather how far physicians must go to comply with the Act's unduly broad requirements. The holdings in *Fargo*, *Lee Mechanical Contractors*, and similar holdings in the other cases relied on by Respondents thus utterly fail to resolve the Act's vagueness.

Finally, Respondent Nixon asserts that—unlike in *State v. Beine*, 162 S.W.3d 483 (Mo. 2005) (en banc), in which this Court recently struck down as unconstitutional a statute that did not contain a scienter requirement for one of its elements—the scienter requirement in section 188.075 "applies to each element of the crime." (Resp't Nixon's Br. at 24.) That is, "the physician must knowingly violate each element of the statutory provision—such as *knowingly* fail to discuss with a woman he *knows* to be seeking an abortion a risk factor that he *knows* to exist in light of the patient's medical history and medical condition." (*Id.* at 27.) But, again, Respondent Nixon's argument fails to demonstrate how the scienter

requirement—even applied to each element of the Act—cures the Act's boundless, and, therefore, impermissibly, vague requirements. Is the physician criminally liable if the physician inadvertently misses one out of the "hundreds" (LF at 435) of situational factors that he or she "knows to exist?" Or, what if the physician fails to disclose a risk factor the physician "knows to exist" but believes is remote or irrelevant for the particular patient? Can he or she be prosecuted?

D. If This Court Concludes That The Act Is Not Vague, It Should Explain The Scope Of Physicians' Obligations Under The Act.

Respondents have completely failed to refute the fact that the Act is boundless. If, nonetheless, this Court finds that the Act is not vague, for the benefit of the federal district court and physicians subject to the Act's requirements, this Court should explain the scope of physicians' obligations under the Act, including how the scienter provisions apply; whether physicians are required to discuss all matters, no matter how irrelevant or remote; whether physicians can tailor their discussion to the particular patient; and, to what extent, if at all, the physician can exercise his or her best medical judgment.

II. THE 24-HOUR WAITING PERIOD IS UNCONSTITUTIONAL

A. The Missouri Constitution Confers Greater Rights Than Conferred By The Federal Constitution.

Respondents argue that the Act's waiting period requirement is constitutional under the Missouri Constitution because "federal and Missouri constitutions have like liberty and privacy rights." (Resp't Nixon's Br. at 28; *see*

also Resp't Joyce's Br. at 23-24.) To the contrary, the language of the Missouri Constitution's guarantees of liberty and privacy afford more protection to the right to choose under the Missouri Constitution than afforded by the United States Constitution. Indeed, Article I, Section 2, guaranteeing the "natural right" to "life, liberty, [and] the pursuit of happiness," has no federal counterpart, and the notion of liberty is more deeply-rooted in the Missouri Constitution than the United States Constitution. (*See* Appellants' Br. at 25-29.) Likewise, the provisions of the Missouri Constitution from which the right to privacy emanates are more explicit and broader than the correlate rights in the federal constitution. (*See id.* at 29-34.)

In these circumstances, a number of state courts have held that their state constitutions confer greater protection to the right to choose than conferred by the United States Constitution.[13] (*See, e.g., id.* at 28.) Respondent Nixon's assertion

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[13] Respondent Nixon cites to two cases from other states, *Mahaffey v. Attorney General*, 564 N.W.2d 104 (Mich. Ct. App. 1997), and *Preterm Cleveland v. Voinovich*, 627 N.E.2d 570 (Ohio Ct. App. 1993), in which the courts concluded that their state constitutions provided "no greater rights to abortion than in the United States Constitution." (Resp't Nixon's Br. at 35.) Both are lower court decisions interpreting their respective state constitutions, and, as far as Appellants are aware, neither the Michigan nor the Ohio Supreme Courts has squarely addressed the issue. Moreover, the courts in those cases relied on the

that "[a]bsent a detailed analysis of how these other state constitutions and their historical interpretations compare to that of Missouri, the[se] cases have no value" (Resp't. Nixon's Br. at 31) is baseless. The cases make clear that the courts relied on the broad language of their state constitutions—language similar to the language in the Missouri Constitution—in finding enhanced protection for the right to choose. *See, e.g., Right to Choose v. Byrne*, 450 A.2d 925, 933-36 (N.J. 1982) (holding that "more expansive language" in state constitution guaranteeing the right to life, liberty, and happiness gives more protection to the right to choose); *Planned Parenthood of Cent. N.J. v. Farmer*, 762 A.2d 620, 629 (N.J. 2000) (same); *Women's Health Ctr. of W.Va., Inc. v. Panepinto*, 446 S.E.2d 658, 664 (W. Va. 1993) (holding that language in West Virginia's constitution similar to language in Article I, Section 2 of the Missouri Constitution confers more protection for women's right to terminate pregnancy).[14]

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constitutional history and/or case law unique to their states, *see Mahaffey*, 564 N.W.2d at 109-11; *Preterm Cleveland*, 627 N.E.2d at 575, 580-81, and Respondent Nixon has utterly failed to explain how those state-specific factors might be analogous here.

[14] Respondent Nixon's efforts to distinguish *Planned Parenthood of Middle Tenn. v. Sundquist*, 38 S.W.3d 1 (Tenn. 2000) are equally unavailing. (Resp't Nixon's Br. at 32.) While the Missouri Constitution may not expressly condemn "the doctrine of non-resistance," it nonetheless "asserts the right of revolution" (*id.*

In addition, where, as here, certain rights are more explicitly stated in the Missouri Constitution than in the federal constitution, this Court has held that Missouri's constitution affords greater protection to those rights than afforded by the federal constitution. (*See* Appellants' Br. at 26 (citing *Strahler v. St. Luke's Hosp.*, 706 S.W.2d 7, 9 (Mo. 1986) (en banc); *Paster v. Tussey*, 512 S.W.2d 97, 101-02 (Mo. 1974) (en banc)).)

By contrast, in each of the cases upon which Respondents rely, the challenged constitutional provision is virtually identical to its federal counterpart. *See Alexander v. State*, 864 S.W.2d 354, 359 (Mo. Ct. App. 1993) (holding same test for a violation of the right to confrontation is applicable under both the Missouri and federal constitutions because "the language of [Section 18(a) of the Missouri Constitution] embodies the same right to compulsory process as the Sixth Amendment"); *State v. Bolin*, 643 S.W.2d 806, 811 n.5 (Mo. 1983)

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at 34) by empowering the citizens of Missouri to "abolish their constitution and form of government whenever they may deem it necessary to their safety and happiness," Mo. Const. art I, § 3. Moreover, it is irrelevant whether the abortion restrictions in *Sundquist* were more or less restrictive than the Act's 24-hour waiting period (Resp't. Nixon's Br. at 32); *Sundquist* makes clear that where, as here, a state constitution affords more protection to the right to choose than the federal constitution, courts should reject federal precedent, like *Casey*, when considering state constitutional challenges.

(following federal precedent because "Article I, § 18(a) of the Missouri Constitution parallels the sixth amendment"); *State v. Schaal*, 806 S.W.2d 659, 662 (Mo. 1991) (right to confrontation); *State v. Hester*, 801 S.W.2d 695, 697 (Mo. 1991) (same); *State v. Hill*, 827 S.W.2d 196, 198 (Mo. 1992) (due process clause); *State ex rel. Sullivan v. Cross*, 314 S.W.2d 889, 893 (Mo. 1958) (same); *State v. Baker*, 103 S.W.3d 711, 717-18 (Mo. 2003) (search and seizure); *State v. Rushing*, 935 S.W.2d 30, 34 (Mo. 1996) (same).

In an effort to fit this square case in the round holes of those cases, Respondent Nixon asserts that the federal and Missouri constitutions confer the same protection to the right to choose because "[t]he right to choose an abortion emanates from the substantive portion of the Due Process Clause of the Fourteenth Amendment of the United States Constitution," and "Missouri's due process clause (Article I, § 10) is similar to the federal counterpart." (Resp't. Nixon's Br. at 29.) There is nothing, however, requiring that the source of the federal and state constitutional right be the same; indeed, a number of state courts have grounded the right to choose in provisions of their state constitutions other than (or in addition to) the due process clause. (*See, e.g.*, Appellants' Br. at 28-29.) Moreover, even if the only source of the state constitutional right were the due process clause of the Missouri Constitution, this Court has previously construed

that clause to be more protective than its federal counterpart. *See State ex rel. J.D.S. v. Edwards*, 574 S.W.2d 405 (Mo. 1978) (en banc).[15]

B. The Undue Burden Standard Does Not Apply.

Respondents assert that the waiting period should be upheld under the undue burden standard articulated in *Casey*, 505 U.S. 833. However, this Court is not bound by that standard in determining whether the waiting period violates the Missouri Constitution; instead, because the guarantees of liberty and privacy in the Missouri Constitution Act afford greater protection to the right to choose than

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[15] Respondent Nixon's argument that Appellants misconstrue the holding in *Edwards* is wrong. The *Edwards* court was confronted with two questions: (1) may the State constitutionally terminate an unwed father's parental rights without an opportunity for a hearing; and (2) if he is entitled to such an opportunity, what standard applies to his substantive rights? *See id.* at 406. In answering the first question, the court held that a law that denied a putative father the opportunity to be heard violated the due process and equal protection guarantees of the United States Constitution. *See id.* at 408. With respect to the second question, however, the court expressly refused to adopt the federal constitutional "best interests of the child" standard applied in *Quilloin v. Walcott*, 434 U.S. 246, 254 (1978), holding instead that, among other things, the due process clause of the Missouri Constitution requires a higher "minimum standard" for assessing the unwed father's substantive rights. *Id.* at 409.

afforded by the federal constitution, the strict scrutiny standard used in *Akron* and other cases[16] to strike down waiting period requirements applies. (*See* Appellants' Br. at 36-37.)[17] Indeed, Respondent Nixon itself recognizes that "if the protections

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[16] Respondent Nixon claims that unpublished decisions, like the one cited by Appellants in support of their statement that "[a] number of state and federal courts applying strict scrutiny have struck down waiting period requirements as unconstitutional" (Appellants' Br. at 36) are "not persuasive authority" (Resp't Nixon's Br. at 37 n.6). This Court, however, routinely relies on other state courts' unpublished decisions in its opinions. *See, e.g.*, *Alcorn v. Union Pac. R.R. Co.*, 50 S.W.3d 226, 242 (Mo. 2001) (en banc) (citing *Shaup v. Frederickson*, No. CIV. A. 97-7260, 1998 WL 726650 (E.D. Pa. Oct. 16, 1998)); *Malan Realty Investors, Inc. v. Harris*, 953 S.W.2d 624, 626 n.3 (Mo. 1997) (en banc) (citing *Hydramar, Inc. v. Gen. Dynamics Corp.*, Civ. A. No. 85-1788, 1989 WL 159267 (E.D. Pa. Dec. 29, 1989)); *State ex rel. Painewebber, Inc. v. Voorhees*, 891 S.W.2d 126, 130 (Mo. 1995) (en banc) (citing *Rosen v. Waldman*, No. 93 Civ. 225 (PKL), 1993 WL 403974 (S.D.N.Y. Oct. 7, 1993)).

[17] Respondent Nixon's reliance on *Herndon v. Tuhey*, 857 S.W. 2d 203, 208 (Mo. 1993) for application of the undue burden standard to this case (Resp't Nixon's Br. at 36-37) is misplaced. Unlike here, that case involved a federal—not state—constitutional challenge to a Missouri statute. *See Herndon*, 857 S.W. 2d at

of the Missouri Constitution are more broad than those protections guaranteed by the United States Constitution . . . this Court [can] consider holding abortion regulations to the rigors of strict scrutiny analysis." (Resp't Nixon's Mem. at 35.)[18]

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206 (challenging statute under First and Fourteenth Amendments to the United States Constitution).

[18] Respondent Nixon's claim that "the only evidence in the record is that a 24-hour wait does not, by itself, cause the procedure to be more dangerous or more difficult to perform" (Resp't Nixon's Br. at 36-37; *see also id.* at 12) mischaracterizes the evidence. Dr. Camel and Dr. Stubblefield stated that—strictly from a medical standpoint—a 24-hour wait does not make the abortion procedure itself more difficult to perform if the woman is healthy, of child-bearing age, and in the first trimester of pregnancy. (LF at 101-102; 118.) They did not state whether the same was true for a woman with health problems or in her second trimester of pregnancy. Moreover, even if the procedure itself is not more difficult, Dr. Stubblefield made clear that the 24-hour waiting period "encumber[s] the process for the patient." (*Id.* at 118.)

CONCLUSION

For the foregoing reasons and the reasons stated in Appellants' Brief, the Court should reverse the decision of the court below and remand for further proceedings.

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Respectfully submitted,

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CERTIFICATION

Pursuant to Rule 84.06(c), I hereby certify that this brief (1) includes the information required by Rule 55.03; (2) complies with the limitations contained in Rule 84.06; and (3) contains 6,784 words. Moreover, the enclosed floppy disk has been scanned for viruses and is virus-free.

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